85-532

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SPORTS AND HEALTH CLUB, INC., d/b/a ST. LOUIS PARK SPORTS AND HEALTH CLUB, et al.,
Appellants,

vs.

STATE OF MINNESOTA, By MARILYN E. McCLURE, and her successor, IRENE GOMEZ-BETHKE, Commissioner, DEPARTMENT OF HUMAN RIGHTS,
Respondent.

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the State of Minnesota violate the United States Constitution by infringing the appellants' First Amendment rights of free speech and free exercise of religion when it ordered them to curtail religious speech in the work place and when it ordered them to hire into policy-making management positions individuals whose moral, religious and life-guiding convictions and management philosophies conflicted with those of the appellants who are the principals of the closely held business?

2. Do the Findings of Fact, Conclusions of Law, and Orders of the Hearing Examiner dated April 26, 1984, and April 27, 1984, as affirmed by the Minnesota Supreme Court, unconstitutionally infringe upon appellants' free exercise of religion in violation of the First Amendment to the United States Constitution?

3. Do the Findings of Fact, Conclusions of Law, and Orders of the Hearing Examiner dated April 26, 1984, and April 27, 1984, as affirmed by the Minnesota Supreme Court, constitute an unlawful establishment of religion in violation of the First Amendment to the United States Constitution?

4. Do the Findings of Fact, Conclusions of Law, and Orders of the Hearing Examiner dated April 26, 1984, and April 27, 1984, as affirmed by the Minnesota Supreme Court, deprive appellants of their right to freedom of association and freedom of speech in violation of the First Amendment to the United States Constitution?

5. Is the Minnesota Human Rights Act, Minn. Stat. Ch. 363.01 (1984), unconstitutional on its face or as applied to the appellants, in that it (as construed by the Minnesota Supreme Court) deprives appellants of their First Amendment rights to freedom of speech, freedom of exercise of religion, freedom from the establishment of religion, and freedom of association, under the Constitution of the United States?

6. Is the Minnesota Human Rights Act, Minn. Stat. Ch. 363.01 (1984), void for vagueness or unconstitutionally overbroad?

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Respondent.

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, Orders and Memorandum of the Hearing Examiner dated April 26, 1984, and the Orders and Memorandum of the Hearing Examiner dated April 27, 1984 have not been reported in any official or unofficial reporter. Copies of the April 26, 1984 Findings of Fact, Conclusions of Law, Orders and Memorandum and the revisions made thereto by letter dated May 9, 1984 are annexed hereto respectively as Appendix

B at page A-72, and Appendix C at page A-205. A copy of the April 27, 1984 Order is annexed hereto as Appendix D at page 212.

The opinion of the Minnesota Supreme Court, Peterson and Yetka, JJ., dissenting, was filed on May 17, 1985. *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.* 370 N.W.2d 844 (Minn. 1985). A copy of this opinion is annexed hereto as Appendix A at page A-1.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

(i) Nature of Proceeding

In this action, the acting Commissioner of the Minnesota Department of Human Rights sought to enjoin the appellants from speech and action which the State alleged to be in violation of the Minnesota Human Rights Act, Minn. Stat. Ch. 363.01 (1984). The appellants asserted that the Minnesota Human Rights Act, facially and as applied, unconstitutionally infringed upon their rights of freedom of religion, freedom of speech, and freedom of association, and that it is void for vagueness and overbreadth.

The case was heard by a state administrative tribunal (hearing examiner) pursuant to the Human Rights Act. The hearing examiner (recently retitled administrative law judge) issued a comprehensive and sweeping injunction, enjoining speech and actions by the appellants. The appellants obtained a Writ of Certiorari from the Minnesota Court of Appeals. Before the Court of Appeals heard the case, the Minnesota Supreme Court granted accelerated review. A divided Minnesota Supreme Court affirmed.

(ii) Relevant Dates

Judgment of the Minnesota Supreme Court: June 28, 1985.

Order of Minnesota Supreme Court denying Petition for Rehearing: June 28, 1985.

Notice of Appeal filed: July 26, 1985, in the Minnesota Supreme Court.

(iii) Jurisdictional Basis

The statutory provision believed to confer jurisdiction of the appeal on this Court is 28 U.S.C. §1257(2), and alternatively, 28 U.S.C. §1257(3) and §2103.

PROVISIONS INVOLVED IN CASE

U.S. Const. Amend. I:

> Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
>
> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Minnesota Human Rights Act, Minn. Stat. Ch. 363.01 (1984) is reprinted in full as Appendix L hereto. Particularly pertinent provisions are as follows:

Minn. Stat. §363.03, subd. 1 (1984):

> Except when based upon a bona fide occupational qualification, it is an unfair employment practice:
>
> * * * *

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, * * * disability, or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against an employee with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

* * * *

(4) For an employer * * * before a person is employed by an employer * * * to

(a) require the person to furnish information that pertains to race, color, creed, religion, national origin, sex, marital status * * *.

Minn. Stat. §363.03, subd. 3 (1984):

It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. * * *

Minn. Stat. §363.101 (1984):

In addition to all other remedies provided under this chapter, every person who commits an unfair discriminatory act as set forth in section §363.03, subdivision 3, or aids, abets, incites, compels, or coerces another to do so, shall be guilty of a misdemeanor.

STATEMENT OF THE CASE

The appellants in this matter, Arthur Owens, Marc Crevier, and Forest Larson, are the owners and operators of seven Sports and Health Club operations in the Minneapolis-

St. Paul metropolitan area. Taken together, the seven operations are Appellant Sports and Health Club, Inc., a closely-held Minnesota corporation. Owens is the President, and Crevier and Larson are Vice-Presidents of the clubs. The Sports and Health Clubs provide recreational and exercise facilities as well as counseling regarding appropriate exercise programs for the 18,000 members. Approximately 140 to 150 people are employed by the clubs.

Owens, Crevier and Larson are men of strong religious belief and commitment. They are, in their own words, "born-again," "evangelical," and "fundamentalist" Christians. As fundamentalist Christians, they believe "that both the Old and New Testaments, in their original texts, are *verbally* inspired of God (citing *Matthew* 5:17-18, 2 *Timothy* 3:16-17, and 2 Peter 1:21 and 3:16) and accordingly are inerrant and the complete and supreme authority in faith and life." *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 856 (Minn. 1985) (Peterson, J., dissenting) (A-27).

Owens, Crevier and Larson each believe that Jesus of Nazareth was and is divine, was and is the Christ, was and is God incarnate, was crucified and bodily resurrected and lives today and forever as Creator, Maintainer, and Ruler of the entire universe. Each believes that every person will ultimately be judged by God as to whether his life has been lived in obedience to the purpose and will of God as revealed in the Bible, and that the eternal destiny of each person hangs in the balance of that judgment. Accordingly, Owens, Crevier and Larson have each made a personal commitment to Christ that they shall follow His teachings in each and every aspect of their individual lives—familial, social,

educational, business, and everything else. Therefore, in the operation of the Sports and Health Clubs they are very evangelical in speaking their Christian faith and distributing Christian literature. They advise prospective employees during job interviews of the existence of the fervent evangelical Christian faith of the owners/operators and some of their employees, and question such prospective employees to determine whether frequent and open expressions of such faith may offend them. The employees' work rules formulated by the owners/operators of the clubs reflect a system of authority which requires a high degree of discipline and a joyful and happy spirit. They will not knowingly hire, and thus subsidize, persons who are involved in fornication, adultery, homosexuality, or who are otherwise openly contemptuous and violative of God's moral laws. A fourteen-foot wide sign with a scriptural quotation hangs in the main office. Evangelical Christian placards, pamphlets, magazines and books are placed in the lounges and other public areas of the clubs. Bible studies are held in the afternoon and all employees are encouraged to attend, although only management employees are required to do so.

There is no dispute but that "[t]he religious beliefs of the owners are clearly legitimate." Their "convictions are deeply held, supported in Biblical scripture, and sincere." 370 N.W.2d at 846 (A-4). As stated by the administrative law judge:

> There is no dispute that the [appellants'] religious beliefs which they rely upon to justify their actions are legitimate and sincere. The complainant has stipulated to this, and the hearing examiner is similarly convinced.

(Opinion of Hearing Examiner, at page 65) (A-190). The appellants operate the Sports and Health Clubs as "a discipleship for Christ." *Id.*

The Minnesota Department of Human Rights brought an administrative action against the appellants on behalf of eleven members, employees and prospective employees, claiming that the appellants' speech and operation of the clubs constituted discrimination on the basis of religion, sex, and marital status, in violation of the Human Rights Act, Minn. Stat. Ch. 363.01 (1984). The department sought to enjoin the appellants from a broad range of speech and conduct, and to obtain the imposition of damages and criminal sanctions. The alleged discriminatory conduct is summarized in the hearing examiner's Findings of Fact:

> Every person who applies for an employment position * * * and who will be dealing with the public * * * must be interviewed and approved by the respondent's President, Arthur Owens, prior to hire. Neither Owens, his Vice Presidents, or his Club managers will hire anyone who, in their view, is "antagonistic to the Gospel." In order to ascertain this, the respondents inquire into the applicant's religion. It is the respondents' sincere belief that a person's "religion" permeates, motivates and directs every thought and action in a person's life, and, in order to find out "what kind [of] a person" they are, "religious" inquiries are made.
>
> * * * *
>
> Owens' employment interviews include reviewing the application and asking questions of the applicant to ascertain information on their [sic] religious views, their [sic] marital status and living arrangements. He explains to each prospect that the Sports Health Clubs are a "Christian organization," that many of the employees are fervently evangelical, and asks whether the interviewee would be "uncomfortable" in such an atmosphere. Owens maintains that a technical background in sales, exercise

and/or nutrition are less important to him than two basic qualifications for employment. They are that the applicant (1) possesses a "teachable spirit" and (2) follows a "disciplined life style". * * * [A]pplicants have been asked * * * to describe in detail their religious beliefs and practices; to give their reaction to respondents' religious beliefs and practices * * *; to describe in detail their family lives, including the marital status of themselves and their parents, whom they live with, and if they live "out of wedlock". Women applicants have been asked * * * if young and single, whether they have their father's (or parents') permission to work; if young and single and living away from home, whether they have their father's (or parents') permission to do so; if married, whether they have their husband's permission to work. * * *

The decision to operate the Sports and Health Clubs as a "discipleship" for Christ was made at a time when the organization was in severe financial trouble and almost went bankrupt. Since that time, the clubs' financial situation has become progressively more prosperous. Owens attributes the turnaround to his decision to take on his "Jewish business partner," Jesus Christ.

* * * *

In the mid-1970's, * * * Head Receptionist Merle Fisher started Bible studies for employees * * *. Ms. Fisher continued to have Bible studies in her home after she left the employ of Sports and Health in 1976, and conducts them to this day. Certain of respondents' employees still attend.

In approximately 1980, Bible studies for employees began to reappear at the Sports and Health Clubs. Owens had conducted Bible studies in his home * * * and he had invited Larson and Crevier. Inspired to spread the Word to others by the message and material presented to them at Owens' residence, the two Vice Presidents began

> to institute Bible studies for employees at the Clubs they ran. * * * Attendance is, and has always been, voluntary, but encouraged. * * *
>
> Bible studies for management personnel have been required at Sports and Health Clubs, Inc. since Owens decided to run the Clubs as a "discipleship" in the mid-1970's. * * *

Opinion of Hearing Examiner, at page 3-8, Appendix A-84 to A-85,

The Sports and Health Clubs have had, and continues to have, in its employ married persons, male and female unmarried persons, divorced males and females, and males and females of various races and colors. The Sports and Health Clubs have also employed, and continue to employ, persons of various religious faiths—Jews, Roman Catholics, Protestants of various denominations, and others—as long as such persons are not offended by the Christian faith of the owners/operators of the clubs, are not antagonistic toward the Christian gospel and will comply with the management's work rules for employees in a cheerful and obedient spirit. *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d at 848. The purpose of the appellants' preemployment inquiries is as follows:

> Owens — or sometimes one of the vice president if managerial employees were not involved — undertook * * * to learn if an applicant had a "teachable spirit" and a "disciplined lifestyle", somewhat interchangeable attitudinal terms. * * * These objectives involved inquiry into family and marital status, for two reasons: first, if it revealed an immoral relationship, Owens was not willing to subsidize it with employment; second, if the applicant came from a disciplined home environment, it

> revealed a favorable likelihood that the applicant had learned submission to authority, acceptance of a task to be done, and capacity to complete that task. Owens considered that employees who resisted authority and instruction demonstrated, in Owens' words, a "lack of *enthusiasm*. They're not able to do, and they don't want to do, these task things to reach the goals that we have set for them." (emphasis supplied). Owens believes, not surprisingly, that a person's religion—if any— "permeates, motivates, and directs every thought and action of that person's life", private and public.

Id., Slip Op. at A-29. (Peterson, J., dissenting). It is only in the case of *managerial* employees that the employee must be a "born again" or "growing" Christian. *Id.*

The appellants' religious beliefs make it impossible for them to separate their personal and business lives from their lives in harmony in Jesus Christ, whom each has accepted as the Lord of his life and as his personal savior at the time of his spiritual "rebirth". (Opinion of Hearing Examiner, at 4). There is no dispute but that the appellants' religious beliefs require the speech and actions detailed above. As stated by the hearing examiner:

> Arthur Owens and his two Vice-Presidents are sincere individuals who truly believe that they are following God's direction, as expressed in the Bible, when they ask religious-based questions designed to uncover "what kind of person" they are speaking to. They are truly sincere in their belief that they are compelled by God to evangelize and proselytize to everyone in order to help guide the listeners into a way of life and belief system that God commands human beings to follow.

* * * *

> The Respondents have ably shown how their job descriptions, personnel policies, and conduct of the clubs' operations relate back to and are based upon scripture. In this, they have succeeded in persuading the Hearing Examiner that all of the decisions regarding the charging parties are connected to the exercise of their religious beliefs.

Opinion of Hearing Examiner, at 65, 72. *See also, In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d at 852 ("Here, the Commissioner concedes, and the record amply supports, that the employment actions taken by Sports and Health, through its sole owners, was the result of deeply held and sincere religious beliefs.") (A-16).

The hearing examiner held that the speech and management policies of the appellants constitute "discrimination" on the basis of religion, sex and marital status in employment and public accommodation. Specifically, the hearing examiner held that the charging parties had been subjected to discrimination as follows:

1. *Joseph Williams*—questions about his religious beliefs and discussion of the religious beliefs of management when discussing possible employment violated Minn. Stat. §363.03, subd. 1(4)(a), which prohibits an employer from requiring a person to furnish information which "pertains to * * * religion" prior to employment.

2. *Robin Carnahan and Beverly Larsen* — questions about their religious beliefs when hired, and their ultimate discharge due to their negative attitude toward the religious work environment, violated Minn. Stat. §§363.03, subd. 1(2)(b) and 1(2)(c), as a discharge and a refusal to upgrade their employment "because of religion".

3. *Robert Severin*—discharge after his criticism that the staff was not as motivated as it had been under prior (non-religious) management violated Minn. Stat. §363.03, subd. 1(2)(b) as a discharge "because of religion".

4. *Steven Bruhjell*—failure to attain promotion to management due to his open disagreement with Owens' religious beliefs violated Minn. Stat. §363.03, subd. 1(2)(c) as a refusal to upgrade his employment "because of religion".

5. *Katherine Lamannsky*—questions about her divorce and statements by Crevier about Bible teachings on divorce when discussing possible employment violated Minn. Stat. §363.03, subd. 1(2)(a), as a refusal to hire "because of * * * marital-status".

6. *Marilyn Crosby and Linda Perkins*—refusal to hire them because they lived with their boyfriends violated Minn. Stat. §363.03, subd. 1(2)(a), as a refusal to hire "because of * * * marital status".

7. *Miriam Cameron*—discussion (*which was initiated by Cameron*) between Cameron, who was a member of a club, and Crevier about religious issues violattd Minn. Stat. §363.03, subd. 3, as a denial of full and equal enjoyment of a place of public accommodation "because of * * * religion".

See Opinion of Hearing Examiner, at 8-19 (A-86 to A-102); *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d 868-72 (Peterson, J., dissenting). (A-52 to A-57). The hearing examiner also held that the appellants' policy of not hiring young unmarried women who live away from home without the permission of their parents, or who do not have their permission to work, and of not hiring married women who do not have their hus-

bands' permission to work, was a violation of Minn. Stat. §363.03, subd 1(2), as discrimination "because of * * * marital status". *Id.* at 867 (A-105).

The appellants contended that the Act, facially and as applied, unconstitutionally infringed upon their rights of freedom of speech, free exercise of religion, and freedom of association; that the Act constituted an establishment of religion; and that the language of the Act was vague and overbroad. All of these contentions were rejected by the hearing examiner. Instead, the hearing examiner issued an order requiring the appellants to pay the complainants damages, and issued a sweeping injunction which prohibits the appellants from:

—refusing to hire any person because of that person's religious beliefs or practices;
—refusing to hire any person because of that person's objection or hostility to the appellants' religious beliefs or practices, *or* to the religious beliefs or practices of any other employee;
—inquiring into the religious beliefs or practices of any prospective or current employee;
—taking any adverse action against any employee because of that employee's religious beliefs or practices;
—refusing to take into management any person based upon that person's religious beliefs or practices;
—requiring, soliciting, or suggesting that any employee attend Bible studies or participate in any other religious exercise or practice;
—taking any adverse action against any employee because of non-participation in Bible studies or other religious exercises;
—taking any adverse action against any employee who objects or is hostile to the religious practices or exercises of management or of any other employee;

—refusing to hire any person because of marital status;
—requiring any prospective employee to furnish information pertaining to marital status;
—denying a management position to any person based upon that person's marital status;
—refusing to hire any young, unmarried woman who lives away from home without her parents' consent, because of that lack of consent;
—inquiring of any young, unmarried woman as to whether she has her parents' consent to live away from home;
—refusing to hire any young, unmarried woman who does not have her parents' consent to work, because of the lack of that consent;
—inquiry of any married woman as to whether she has her husband's consent to work;
—"harrassment" or "ridicule" of any member or guest because of religion.

See Opinion of Hearing Examiner, at 20-22.

The hearing examiner's primary Findings, Conclusions and Orders were issued on April 26, 1984. By Order dated April 27, 1984, the hearing examiner certified four classes of complainants and ordered notice to potential class members. On May 1, 1984, the hearing examiner issued an Order staying the effect of his prior Orders until May 21, 1984, to allow the appellants time to perfect an appeal. The appellants obtained a Writ of Certiorari from the Minnesota Court of Appeals on May 7, 1984. On May 21, 1984, the Chief Judge of the Court of Appeals granted an extension of the stay of the hearing examiner's Order until the Minnesota Supreme Court could act upon the appellants' motion for accelerated review by that Court.

On August 29, 1984, the Minnesota Supreme Court

granted the petition for accelerated review. In the Supreme Court, appellants again asserted that the Minnesota Human Rights Act, facially and as applied, unconstitutionally infringed upon their rights of freedom of speech, free exercise of religious convictions, and freedom of association. The Court issued its opinion on May 17, 1985. In that opinion, a divided Court upheld the hearing examiner's orders and rejected the appellants' Constitutional challenges. The Court acknowledged that the appellants' religious convictions "are deeply held, supported in Biblical scripture, and sincere." *In the Matter of the State of Minnesota v. Sports and Health Club, Inc., supra,* 370 N.W.2d at 846 (A-16). It also acknowledged that the appellants' "religious practices and beliefs spill over into, and in fact require, their employment practices"; "that the employment actions taken by Sports and Health, through its sole owners [were] the result of deeply held and sincere religious beliefs"; and "that the Minnesota Human Rights Act abridges those beliefs." *Id.* 370 N.W.2d at 846 (A-16). The Court held, however, that the State's "compelling interest in prohibiting discrimination in employment and public accommodation" justified the hearing examiner's actions; and that no less restrictive means was available. *Id.*, 370 N.W.2d at 853 (A-16). No discussion of the speech or association issues appears.

Justices Peterson and Yetka dissented. In a forty-two page dissent, Justice Peterson stated that "[t]he issues presented in this case are of as profound importance as any raised in my eighteen years on this Court, issues of important constitutional principle." *Id.*, 370 N.W.2d at 854, 855 (Peterson, J., dissenting) (A-22). He stated that "[t]his case is unique * * *, because a statute designed to protect the religious from discrimination has been invoked by the merely nominally religious against Owens, a man of strong religious belief and commitment." *Id.* 370 N.W.2d at 855. He stated:

> The examiner's disposition of the basic issue in this case was as sweeping as it was superficial: Owens' religious beliefs are sincere but, when put into practice in a commercial service business, simply irrelevant. * * * The examiner * * * decrees a dichotomy between Owens' beliefs and practices, divorces the sacred from the secular, does not distinguish praying on one's knees on Sunday from preying on other persons in the marketplace on Monday, and perceives no significant difference between the commitment of conviction and the detachment of a possibly more casual Sabbath ceremony or community convention.
>
> * * * *
>
> [T]he examiner, in his findings, conclusions, and orders, interpreted the statute not only in a "liberal" fashion but in a remarkably extravagant way.
>
> On the other hand, the three-factor constitutional analytical framework has the opposite mandate, for it imposes restrictions against intrusions upon fundamental and overriding civil liberties. The examiner acknowledged, as to the first factor, that the sincere religious beliefs of Owens were burdened by the Act, but with respect to the second and third factors, he did no more than make the uncritical declaration that the burden was justified by a compelling state interest, without less restrictive alternatives of interpretation or enforcement.

Id, 370 N.W.2d at 859, 864 (A-44)). Justice Peterson noted the "unwarranted sweep of the cease and desist orders"; and that the Examiner's injunction against the appellants' "soliciting or suggesting participation in Bible studies" is "so patently unconstitutional as to require no other comments beyond identifying it". *Id.*, 370 N.W.2d

at 868, 870 (A-52, A-57). He also stated that "[i]t is preposterous to impose sanctions upon an employer, particularly this employer, who refused to employ persons whose conduct constitutes criminal misbehavior"; and that [t]o hold, as here, that a vigorous and robust debate on a religious subject, however controversial, may be statute or administrative order be prohibited or made subject to a monetary penalty is a most flagrant denial of freedom of speech." *Id.*, 370 N.W.2d at 872, 873 (A-61).

Justice Yetka also dissented, stating:

> Here is an [a]ct which has as its stated purpose the elimination of discrimination in employment. It has been rightly invoked to protect minorities—in color, gender, and religion. Yet, it would discriminate against the majority religion in the United States since the nation's founding, namely, Christianity. This decision would deny a Christian the right to practice his belief in the marketplace. It would deny an employer the right to basic information about a prospective employee that affects not only the well-being of the employer and his business, but also that of the propspective employee's fellow employees. I find the findings so repugnant that it reaches the stage of being ridiculous.

Id., 370 N.W.2d at 876 (Yetka, J., dissenting) (A-70). In short, in this case the Human Rights Act is not a shield against discrimination, but a sword for it.

On June 28, 1985, the Minnesota Supreme Court denied that appellant's Petition for Rehearing, but granted a stay of the effect of the hearing examiner's orders for forty-five days in order that the appellants could perfect an appeal to the Supreme Court of the United States. That stay has

expired. Judgment was entered by the Minnesota Supreme Court on June 28, 1985. The appellants' Notice of Appeal was filed on July 26, 1985.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This case presents questions of profound and fundamental constitutional importance:

1. May a State, through the imposition of civil and criminal sanctions and injunctions, prevent the owners or operators of a business from exercising their religous beliefs in the operation of that business, on the ground that employees or patrons are entitled to a "morally neutral" environment (a Scriptural impossibility—*Matthew* 6:24) under the State Human Rights Act?

2. Where the beliefs and philosophy of an employer stem from deeply held and sincere religious convictions, may a State, solely because the beliefs are religious, through the imposition of civil and criminal sanctions and injunctions, compel the employer to hire or promote into management positions persons who are antagonistic and hostile to the beliefs and philosophy of the management of the employer and who are hostile to the beliefs of other employees (a Scriptural prohibition—2 *Corinthians* 6:14)?

3. May a State, through the imposition of civil and criminal sanctions and injunctions, prevent an employer from discussing religious or moral issues with employees or patrons, or suggesting participation in religious learning experiences or practices (a Scriptural mandate—*Mark* 16:15) on the ground that the speech is in violation of the State Human Rights Act?

4. May a State, through the imposition of civil and criminal sanctions and injunctions, compel an employer to hire persons who are living in violation of the state's criminal laws against fornication and sodomy (*See* Minn. Stat. §§ 609.34, 609.273), and forbid that employer from making an inquiry into the moral values of prospective employees, on the sole ground that the employer's actions are motivated by religious beliefs?

First among the Amendments to the United States Constitution is the admonishment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". These prohibitions apply equally to the States and their legislatures through the Fourteenth Amendment. *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 571 (1942); *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

This Court has long held that the Religion Clauses of the First Amendment must be regarded by the courts as protecting liberties of the highest order. As stated by this Court in *Wisconsin v. Yoder,* 406 U.S. 205 (1972):

> [T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by the government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. * * *
>
> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Id. at 214-215.

Freedom of conscience and religious belief cannot be restricted by law. *Cantwell v. Connecticut, supra* at 303. The First Amendment also safeguards the free exercise of the chosen form of religion. "Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. * * * In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id.*, at 303-304.

A challenge to state action under the Free Exercise Clause must begin with a consideration of the nature and extent to which the state action interferes with or burdens the free exercise of religious beliefs. *United States v. Lee,* 455 U.S. 252, 256-257 (1982); *Wisconsin v. Yoder, supra* at 220. Second, the state must justify the limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. *United States v. Lee, supra* at 257-258; *Wisconsin v. Yoder, supra,* at 214. Inherent in determining whether the limitation is essential to the governmental interest is consideration of whether accommodation by the state would "unduly interfere with the fulfillment of the governmental interest," *United States v. Lee, supra* at 259, and whether the governmental regulation is the "least restrictive means" of promoting the governmental interest. *Thomas v. Review Board of Indiana Employment Security,* 450 U.S. 707, 718 (1981).

There is no question but that the religious beliefs of the appellants are sincere, legitimate, and of deep-seated resolve. There is also no question but that the appellants' religious beliefs require them to conduct *all phases* of their lives,

including their business endeavors, in accordance with Biblical teachings and the law of God, and that the speech, actions, and management philosophy which are prohibited by the State in this case are required by the appellants' religion.

The burden which is imposed upon the appellants in this case is prohibitive and complete. Because of their religious convictions, they will have no recourse but go out of business if the State Human Rights Act is enforced against them as sought by the State. The right to free exercise of religion which is guaranteed by the federal constitution will be meaningless to them. Any business that they enter which involves the hiring of employees or the rendition of service in a place of accommodation will be "off limits" to them because of their compulsion to follow Biblical teachings. They will be prohibited from speaking to employees or others in the market or business place under the constant threat that if they are open and evangelical in their faith, a complaint of religious discrimination will be filed with State authorities. Enforcement of the hearing examiner's orders will effectively abolish the appellants from the business community—all because they openly proclaim and act in accordance with their Christian beliefs. As acknowledged by the State and by the Minnesota Supreme Court, enforcement of these orders will not only burden, but will completely abridge, the exercise of the appellants' religious beliefs. *In the Matter of the State of Minnesota v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 852 (Minn. 1985).

The State contends that this abridgment is justified by the State's compelling interest in eliminating all forms of discrimination. What the State ignores is that the orders in this case do not effectuate an end to discrimination on the

basis of religion, sex or marital status in the hiring of employees; the appellants already hire persons of all religions, both sexes, and any marital status. What the State has accomplished, instead, is discrimination against the religion of the Appellants by decreeing that all questioning or speech which deals with moral values, all questioning or speech which is designed to determine the attitude of the prospective employee toward the religion of the appellants and other employees, and all other speech or discussion about religious issues by the appellants with employees or patrons, must be supressed *because* it is the product of their religious beliefs.

There is no doubt but that a prospective employee's views on moral (and perforce religious) issues are not only relevant but are solicited by employers. There is no doubt but that views on abortion could be elicited before an employee is hired to work in a medical office in which abortions are performed, or to work in a "right to life" organization. There is no doubt but that views on homosexuality or gay rights could be elicited by an employer whose clientele is largely homosexual. What the State has decreed in this case is that a Nazi must be hired to work, and promoted to management, in a business owned by Jews; that an employee who is openly contemptuous and derisive of "Born Again" Christianity, must be hired to work, and promoted to management, in a business owned by "Born Again" Christians. Never before has a state's interest in "eradicating discrimination" been used to eradicate religious speech and exercise, *solely because* it is religious.

Indeed, in this case the Human Rights Act which is intended to protect against discrimination has become an instrument of discrimination. Under the guise of protecting

prospective employees from discrimination, the state is undertaking to eliminate the right of born again Christians from exercising the scriptural mandates in the market place. The Act is being used to suppress religious expression. The shield of protection has become a sword of destruction.

Accommodation of the appellants' religious rights would not interfere with the fulfillment of any valid governmental objective. In the case of the initial hiring of employees, the appellants *do not* refuse to hire persons based upon their religion, sex, or marital status. It is only with regard to the promotion to policymaking management positions that the appellants' require that the employee be a "growing Christian." This is based upon the Biblical injunction that they not be "unevenly yoked" with nonbelievers. (2 Corinthians 6:14-18). There is no evidence in this record to indicate that the granting of an exemption to the appellants in the case of management employees would lead to widespread claims of such religious beliefs, or would otherwise unduly impede the State's interests. *See Thomas v. Review Board of Indiana Employment Security, supra* at 707; *Wisconsin v. Yoder, supra* at 221.

Moreover, it is incumbent upon the State to demonstrate that no lesser form of regulation would effectuate the State's interests. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). In this case, the Hearing Examiner has issued a sweeping injunction which is aimed at the complete eradication of Appellants' moral and religious values from their speech and actions in the marketplace. Surely this is not the "least restrictive alternative" available to serve the State's narrow interest in preventing discrimination based upon sex, religion, or marital status in employment or public accommodation.

In this highly sensitive Constitutional area " '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " *Sherbert v. Verner, supra,* at 406. Restrictions on the free exercise of religion are allowed only when it is necessary to prevent grave and immediate danger to interests which the state may lawfully protect." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943). Nor is speech any less protected because it is religious in nature. *See Heffron v. International Society for Krishna Consciousness,* 425 U.S. 640, 647 (1981).

Appellants are not unaware of the fact that the activities of individuals, even when religiously based, are often subject to State regulation. *See Wisconsin v. Yoder, supra,* at 220. "But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment * * *." *Id.* Conduct is inextricably intertwined with religious belief; "in this context belief and action cannot be neatly confined in logic-tight compartments." *Id.* Because of the need for speech and expression for religious belief to live and thrive, this Court has upheld state regulation of religiously-based conduct only when it has posed some substantial threat to public safety, peace or order. *Sherbert v. Verner, supra* at 403.

The State's prosecution of the appellants in this case raises an issue of fundamental importance: can the State impose and enforce a complete divorce between religious belief and practice in everyday life? The State's action in this case decrees that persons must live two disparate, compartmentalized lives—one secular and one spiritual. There are two days (at most) for worship—they are spiritual; the rest of

the week is secular. To these appellants, and to millions of others throughout this country and around the world, nothing could be further from the truth. For them, their religion is a 100% full-time practice. It permeates, governs and controls their every thought, word and deed. To demand that a person with such religious convictions act in accordance with them on some occasions, and not on others, is to ask for the impossible.

The First Amendment requires the State to be neutral in its relations with religious believers and non-believers. "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Board of Education,* 330 U.S. 1, 14-15 (1947). "[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do not believe.' " *Abington School Dist. v. Schempp,* 374 U.S. 203, 205 (1963), quoting *Zorach v. Clauson,* 343 U.S. 306, 314 (1952). If the purpose or the primary effect of a State enactment "is the advancement *or inhibition* of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Id.,* at 222 (emphasis added). The State's prosecution of Appellants' speech and conduct, solely because of its religious fiber, is an unconstitutional establishment of secularist beliefs. Such state action is prohibited by the Constitution. As stated in *Engel v. Vitale,* 370 U.S. 421 (1962):

> Under our Bill of Rights, free play is given for making religion an active force in our lives. But "if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government." *McGowan v. Maryland,* 366 U.S. 420, 563, 81 S.Ct. 1101, 1219, 6 L.Ed.2d 293 (dissenting opinion).

> * * * The First Amendment leaves the Government in a position not of hostility to religion but of neutrality.

Id., at 442-443 (Douglas, J., Concurring).

This case presents questions of fundamental importance to all persons who wish to live their lives in accordance with deeply-held religious convictions. The action by the State against these appellants is direct and severe. The Constitutional issues involved are of paramount importance and deserve plenary consideration by this Court.

Respectfully submitted,

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